APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NORMA I. ACEVEDO-VILLALOBOS, AND THE OTHER PETITIONERS IDENTIFIED IN APPENDIX I-1 TO I-8

PETITIONERS

V.

HON. RAFAEL HERNANDEZ, ET AL., RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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APPENDIX A-1

UNITES STATES COURT OF APPEALS
For the First Circuit

No. 93-1544

NORMA I. ACEVEDO-VILLALOBOS, ET AL.,

Plaintiffs, Appellants,

v.

HON. RAFAEL HERNANDEZ, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., Senior U.S. District Judge]

Before
Cyr, Circuit Judge,
Bownes, Senior Circuit Judge,
and Stahl, Circuit Judge.

Jesus Hernandez-Sanchez, with whom Hernandez-Sanchez Law Firm was on brief For appellants.

Fidel A. Sevillano Del Rio, Assistant United States Attorney, with whom Guillermo Gil, United States Attorney, Donnie R. Murray, Deputy Regional Counsel, United States Department of Housing and Urban Development, and Teresa Pombo, Chief Counsel, United States Department of Housing and Urban Development, were on brief for appellEes, United States, et al.

Vannessa Ramirez-Kausz, Assistant Solicitor General for the Commonwelth of Puerto Rico, with whom Carlos Lugo-Fiol, Deputy Solicitor General, was on brief for appellee, Commonwealth.

April 28, 1994

BOWNES, Senior Circuit Judge. This appeal raises a procedural question of first impression in our circuit: whether the dismissal of a complaint, which does not explicitly dismiss the action, constitutes a "final decision[]," and is therefore appealable under 28 U.S.C. § 1291.[1] We rule in the affirmative, holding that the plaintiffs had both the right to appeal from the judgment dismissing their complaint and the duty to do so in a timely manner. Because plaintiffs' appeal was not timely, we lack jurisdiction to review the dismissal of the complaint. Furthermore, we conclude that appellate jurisdiction is lacking over the district court's denial of plaintiffs' first motion for postjudgment relief, and that their second such motion was untimely, and therefore properly denied by the district court. Accordingly, we

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[1] **Section 1291 provides: "The courts of appeals. . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."**

affirm.

I.

BACKGROUND

Plaintiffs-appellants are, for the most part, former employees of the Puerto Rico Public Housing Administration (PRPHA). On May 2, 1992, PRPHA and the Commonwealth of Puerto Rico, acting through former governor Rafael Hernandez Colon, signed an agreement with representatives of the United States Department of Housing and Urban Development (HUD). Under the agreement, the Commonwealth and HUD agreed to take certain actions in order to expedite the privatization of the management of federally funded public housing projects in Puerto Rico, as well as the decentralization of PRPHA. The privatization provisions of the agreement are at the center of plaintiff' claims.

The agreement committed the Commonwealth to

pursue, and HUD to support, a plan to privatize federally assisted housing projects by transferring the administration and maintenance of such projects to private contractors. As a result of this privatization, a sizeable percentage pf PRPHA's employees would be laid off. The agreement between HUD and PRPHA briefly addresses the plight of PRPHA's employees in a cursory manner:

> The private management process may require the elimination of positions within the present structure of the PRPHA. Employees holding said positions will receive benefits as provided by law. HUD will provide federal funding for payment of their benefits resulting from the federally funded public housing program. The Commonwealth will fund costs ineligible for federal funding.

Privatization Agreement. Art. I, § 4. In addition, PRPHA

agreed to encourage private contractors to employ displaced employees. Id. at § 6b. Shortly thereafter, PRPHA formulated a layoff plan to comply with the relevant provisions of Puerto Rico's Public Service Personnel Act. see 3 L.P.R.A. § 1336(6). A layoff plan was finalized in April 1992, and the privatization agreement was set to go into effect on August 1.

On June 26, 1992 letters were sent to PRPHA employees notifying them that,

> [s]ince you are one of the persons affected by layoffs, we notity you that owing to lack of work, we have no other alternative than to decree your layoff from public service effective July 31, 1992. We advise you of your right to present arguments or documentary evidence, if any [,] which you consider will benefit you, before the designated official.

On July 15, 1992, plaintiffs filed an action in United states District Court for the District of Puerto Rico against various Commonwealth and federal agencies and officers,[2] seeking injunctive, declaratory and monetary relief.

Plaintiffs' constitutional claims against the state defendants are predicated upon 42 U.S.C. § 1983, while their constitutional claims against the federal defendants are based on the doctrine set forth in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). The major themes of plaintiffs' complaint are as follows. First, plaintiffs allege that the privatization agreement is invalid (and consequently that the layoffs were illegal) because

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[2] **The defendants in this action fall into two groups: the United States of America, HUD, and various HUD officials (hereinafter, the "federal defendants"), and the former governor of Puerto Rico, PRPHA, and various PRPHA officials. (hereinafter, the "state defendants"). All of the individuals were sued in their official and personal capacities.**

it was entered into in violation of both Puerto Rico and federal law, and that the various local and federal defendants acted ultra vires by signing the agreement. Accordingly, plaintiffs allege that the layoffs were illegal. Next, plaintiffs allege that they had a property interest in their jobs, and that they were deprived of this property interest without due process. Finally, plaintiffs maintain that a Puerto Rico official made derogatory comments about them in public, thereby depriving them of "liberty" without due process.

On October 27, 1992, the state defendants moved to dismiss the complaint, or alternatively, for summary judgment, on a plethora of grounds including, but not limited to, the complaint's failure to state a claim upon which relief could be granted. See Fed. R. Civ. P. 12(b)(6). Two days later the state defendants moved to stay discovery pending the court's resolution of their

dispositive motion. The court granted the requested stay.

On January 15, 1993, the district court granted the state defendants' motion to dismiss. The court stated that "[p]laintiffs' complaint fails to provide the Court with a clear idea of the contours of their claims and also fails to provide appropriate support for their allegations." Gonzalez v. Hernandez, No. 92-1972, slip op. at 4 (D.P.R. Jan. 15 1993). According to the court, plaintiffs' complaint was "infected with conclusory allegations and unfounded accusations," id. at 5-6, and "insufficciently illustrate[d] the essential nature of their claim[s]." Id. at 4. The court dismissed plaintiffs' complaint in its entirety, stating: " The Court therefore ORDERS that defendants' Motion to Dismiss pursuant to Rule 12(b)(6) is hereby GRANTED and that plaintiffs' complaint is hereby DISMISSED." Id. at 6. On the same day the court entered judgment on a separate document, pursuant to

Fed. R. Civ. P. 58 and 79(a), which stated as follows: " By virtue of the Opinion & Order of the Court, entered on this date, it is hereby ORDERED, ADJUDGED and DECREED that plaintiffs' complaint is DISMISSED." Plaintiffs filed two postjudgment motions for relief, both of which were denied. This appeal ensued.

II

DISCUSSION

In their notice of appeal filed May 14, 1993, plaintiffs list four decisions of the district court from which they appeal: (1) the judgment of January 15, 1993 dismissing the complaint, and the court's opinion and order of the same date; (2) the order of November 30, 1992 granting a stay of discovery; (3) the order of March 2, 1993 denying plaintiffs' first Rule 59(e) motion for reconsideration and to amend the complaint; and (4) the order of April 19, 1993 denying plaintiffs' second Rule

59(e) motion for reconsideration.[3]

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[3] The plaintiffs asserted, at oral argument before us, that the district court had dismissed only the state defendants' claims, leaving the federal defendants' claims unresolved. Thus, appellants argued, this court should remand the case to permit the district court to comply with Fed. R. Civ. P. 54(b) (where multiple claims or parties are involved court may direct entry of final judgment as to one or more but fewer than all the claims or parties). At no point did plaintiffs ever assert or suggest this contention before the district court, either in their motions for reconsuderation or in any of their numerous other postjudment filings. In all events, however, their belated contenton, if not waived, is without merit.

The district court unmistakably intented to dismiss the complaint in toto, pursuant to Fed. R. Civ. P. 12(b) (6), for failure to state a cognizable cause of action. Its opinion and order is most reasonably read as having dismissed the entire complaint even though it adverts only to the motion to dismiss filed by the state defendants. Furthermore, the final judgment itself expressly dismissed "the plaintiffs' complaint" after the federal defendants had filed their own motion to dismiss shortly before the district court entered its opinion and final judgment. We are satisfied, therefore, that plaintiffs' belated Rule 54(b) contention in no sense warrants an inference that plaintiffs were misled or the judgment was not final. Consequently, the requirements of Rule 54(b) are not implicated.

A. Dismissal of the Complaint

Under Fed. R. App. P. 4(a) (1), any party appealing from a judgment or order of the district court, where "the United States or an officer or agency thereof is a party," must file a notice of appeal within sixty days of the date of entry of the judgment or order. Timely filing of a notice of appeal is "mandatory and jurisfictional." Perez-Perez v. Popular Leasing Rental, Inc., 993 F.2d 281, 283 (1st Cir. 1993) (quoting Browder v. Director, Dep't of Corrections, 434 U.S. 257, 264 (1978)). In the present case, plaintiffs' notice of appeal was filed more than 100 days after entry of the judgment dismissing the complaint. But, under Fed. R. App. P. 4(a) (4), a timely motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e) tolls the time for filing a notice of appeal, and the time for filing the notice starts to run from the entry of the order denying said motion. See United

States v. 789 Cases of Latex Surgeon Gloves, 13 F.3d 12, 14 (1st Cir. 1993); Fed. R. App. P. 4(a) (4). Under Rule 59(e), "[a] motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." Fed. R. Civ. P. 59(e).

Although plaintiffs' original Rule 59(e) motion was timely filed (it was served within ten days from the entry of the judgment dismissing the complaint), their notice of appeal was not filed until sixty-four days after the entry of the order denying of the motion. Thus, even with the benefit of Rule 4(a) (4)'s tolling provision, plantiffs' notice of appeal was seemingly late. We lack jurisdiction over late appeals.

This brings us to the principal issue on appeal: Plaintiffs now argue that the judgment dismissing their complaint was not a "final decision:" within the meaning of 28 U.S.C. § 1291, and that their time to file a notice of

appeal did not start to run until the denial of their second motion for reconsideration. Because the notice of appeal was filed within sixty days from the entry of the order denying the second motion, plaintiffs maintain that their notice of appeal was timely with respect to the underlying judgment.

We have never ruled on this procedural dilemma. It has, however, given rise to some disagreement among those circuits that have. Three distinct views have emerged. The Seventh and Ninth Circuits have held that the dismissal of a complaint, as opposed to the dismissal of an action, is not a final, appealable order, unless the trial court has made clear in dismissing the complaint that the action could not be saved by amendment. See Benjamin v. United Sates, 833 F.2d 669, 672 (7th Cir. 1987); Ruby v. Secretary of United States Navy, 365 F.2d 385, 387 (9th Cir. 1966), cert. denied, 386 U.S. 1011

(1967). On the other hand, the Second and Eighth Circuits have held that, absent an express grant of leave to amend, an order dismissing the complaint is final and appealable. See Weisman v. LeLandais, 532 F.2d 308, 309 (2d Cir. 1976); Quartana v. Utterback, 789 F.2d 1297, 1300 (8th Cir. 1986). Finally, the Eleventh Circuit has carved out a middle ground. It has held that such an order of dismissal is not final if "the plaintiff could not have been reasonably expected to realize that the court was entering a final order." Czremcha v. International Ass'n of Mach. & Aero. Workers, 724 F.2d 1552, 1555 (11th Cir. 1984).

Before deciding which,if any, of these three approaches to adopt, we briefly explain the rationale underlying each. The Seventh and Ninth Circuits have held that the dismissal of a complaint is not final and appealable because a motion to dismiss is not a

"responsive pleading" within the meaning of Fed. R. Civ. P. 15(a),[4] and thus a plaintiff still retains his or her rights to amend once as a matter of course under Rule 15(a) even after a motion to dismiss has been granted. See Car Carries, Inc. v. Ford Motor Co., 745 F.2d 1101, 1111 (7th Cir. 1984), cert. denied, 470 U.S. 1054 (1985); 222 East Chestnut St. Corp. v. Lakefront Realty Corp., 256 F.2d 513 (9th Cir.), cert. denied, 358 U.S. 907 (1958).

In Elfenbein v. Gulf & Western Indus., Inc., 590 F.2d 445, 448 n.1 (2d Cir. 1978), the Second Circuit explained that the split on this issue was based on the circuits'

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[4] **Rule 15(a) provides, in relevant part:**

> **A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . . Otherwise a party may amend the party's pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires.**

differing views on the right to amend a complaint under Rule 15(a) once a motion to dismiss has been granted. The court stated:

> [w}hile the law in this circuit is that a motion to dismiss is not a responsive pleading, and therefore the complaint may be amended without leave of the court [after such a motion is made], it is equally well established that this right terminateS upon the granting of the motion to dismiss.

Id. (citations omitted). The Eighth Circuit, which shares the Second Circuit's view that the right to amend under Rule 15(a) terminates upon dismissal, found that this distinction provided support for following the Second Circuit's rule that the dismissal of a complaint was a "final decision," but did not view the distinction dispositive.[5]

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[5] **The court cited the Eleventh Circuit's opinion in Czeremcha, 724 F.2d at 1554-56, to illustrate this point. According to the Eleventh Circuit, after a complaint is dismissed the right to**

Ultimately, the Eighth Circuit joined the Second, reasoning as follows:

> Where matters of finality (and therefore of appellate jurisdiction) are concerned, we believe it preferable to adopt rules that promote clarity and certainnty. The Second and Ninth Circuit rules have an advantage over that of the Eleventh Circuit in this regard because they focus solely on the 'anguage of the dismissal order, requiring an explicit contrary statement to avoid a presumption of finality (Second Circuit) or non-finality (Ninth Circuit). Comparing the Second and Ninth Circuit rules, that of the Second Circuit commends itself because it

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amend under Rule 15(a) terminates. But the dismissal does not act as a final judgment, and the plaintiff may still move the court for leave to amend unless the "court has clearly indicated either that no amendment is possible or that dismissal of the complaint also constitutes action." Id. at 1556 n.6.